Office-Supreme Court, U.S.
FILED
APR 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-695

IN THE

# Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

*Appellant,*

*vs.*

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

*Appellees.*

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.**

## REPLY BRIEF.

JOHN K. VAN DE KAMP,
Attorney General of the
State of California,
EDMOND B. MAMER,
PATTI S. KITCHING,
Deputy Attorneys General,
3580 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 736-2104,

*Attorneys for Appellant,*
*Franchise Tax Board of the*
*State of California.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## TABLE OF CONTENTS


Page

Argument ..... 1

I

This Case Did Not Arise Under Federal Law; Therefore the District Court Did Not Have Subject Matter Jurisdiction ..... 1

II.

California Revenue & Taxation Code Section 18817 Has Not Been Preempted by ERISA Section 514 ..... 6

A. Revenue and Taxation Code Section 18817 Does Not Relate to nor Regulate the Terms and Conditions of a Vacation Plan ..... 8

B. Revenue and Taxation Code Section 18817 Does Not Interfere With the Purposes of ERISA ..... 9

C. Exceptions to ERISA's Preemption Have Been Found for High Public Purposes. The Collection of Revenue Serves a High Public Purpose ..... 11

III.

The Power to Assess and Collect the Tax Is Essential to the State of California ..... 12

IV.

The Amendment to ERISA Section 514 Must Be Interpreted by Reference to the Agsalud Decision ..... 12

Page

V.

The Board Must Be Allowed to Use Its Cumulative Tax Collection Remedies With Regard to the Construction Laborers. The Wage Garnishment Remedy Alone Is Not Adequate ..... 13

VI.

The Department of Labor Ruling Is Incorrect ..... 15

VII.

The Board May Levy Upon a Spendthrift Trust in Order to Satisfy a Participant's Tax Delinquency ..... 16

VIII.

ERISA Sections 403(c)(1) and 404(a)(1) Do Not Prohibit the Board's Levy ..... 18

IX.

Revenue and Taxation Code Section 18817 Is Not Preempted by the National Labor Relations Act ..... 19

X.

Any Administrative Duties Caused by the Board's Levy Are Outweighed by the State's Right to These Funds 19

Conclusion ..... 20

## TABLE OF AUTHORITIES

Cases — Page

Alessi v. Raybestos-Manhattan, Inc. (1981) 451 U.S. 504 ..... 7, 8, 9, 10
Alton Box Bd. Co. v. Esprit De Corp. (9th Cir. 1982) 682 F.2d 1267 ..... 3
American Tel. & Tel. Co. v. Merry (2nd Cir. 1979) 592 F.2d 118 ..... 19
Arkansas v. Kansas & Texas Coal Co. (1901) 183 U.S. 185 ..... 1, 6
Bell v. Hood (1946) 327 U.S. 678 ..... 2
Campa, In re Marriage of, (1979) 89 Cal.App.3d 113 app. dismissed (1980) 444 U.S. 1028 ..... 18
Electrical Workers v. IBEW-NECA Holiday Trust, 583 S.W.2d 154 (Mo. 1979) ..... 18
Farmer v. Carpenters (1977) 430 U.S. 290 ..... 19
First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank (8th Cir. 1980) 627 F.2d 843 ..... 1, 3, 4
Guinasso v. Pacific Fed. Sav. & Loan Ass'n (9th Cir. 1981) 656 F.2d 1364, cert. denied (1982) 455 U.S. 1020 ..... 3
Gully v. First Nat. Bank (1936) 299 U.S. 109 ..... 2, 4
Hines v. Davidowitz (1940) 313 U.S. 52 ..... 8
Home Federal S & L Ass'n v. Ins. Dept. of Iowa (8th Cir. 1978) 571 F.2d 423 ..... 3
Jones v. Rath Packing Co. (1977) 430 U.S. 519 ..... 7, 10
Kelly v. Washington (1937) 302 U.S. 1 ..... 7
Kohn v. Central Distributing Co. (1939) 306 U.S. 531 .... 5
Kramarsky v. Delta Airlines, Inc. (2nd Cir. 1981) 666 F.2d 21 ..... 9
Leuschner v. First Western Bank and Trust Company (9th Cir. 1958) 261 F.2d 705 ..... 17
Louisville & Nashville R.R. v. Mottley (1908) 211 U.S. 149 ..... 2
Madsen v. Prudential Federal Sav. & Loan Ass'n (10th Cir. 1981) 635 F.2d 797, cert. denied (1981) 451 U.S. 1018 ..... 3, 4

Page

McGolgan v. Magee, Inc. (1916) 172 Cal. 182 ..... 16, 17
Mercantile Trust Co. v. Hofferbert (Md. 1944) 58 F.Supp. 701 ..... 17
Michigan Sav. & Loan League v. Francis (6th Cir. 1982) 683 F.2d 957 ..... 3
Miller Wohl Co. v. Com'r of Labor & Industry (9th Cir. 1982) 685 F.2d 1088 ..... 3
National Carriers Conf. Com. v. Heffernan (D. Conn. 1978) 454 F. Supp. 914 ..... 6
New York State Dept. of Soc. Services v. Dublino (1973) 413 U.S. 405 ..... 7
Pan Am. Corp. v. Superior Court (1961) 366 U.S. 656 ..... 2, 3, 4, 6
People of State of Ill. v. Kerr-McGee Chem. Corp. (7th Cir. 1982) 677 F.2d 571, cert. denied (1982), 103 S.Ct. 469 3
Phillips Petroleum Co. v. Texaco, Inc. (1974) 415 U.S. 125 ..... 2
Public Serv. Comm'n v. Wycoff, Co. (1952) 344 U.S. 237 ..... 5
Rath Packing Co. v. Becker (9th Cir. 1975) 530 F.2d 1295, aff'd on other grounds sub nom. Jones v. Rath Packing Co. (1977) 430 U.S. 519 ..... 5
Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218 ..... 7
San Diego Unions v. Garmon (1959) 359 U.S. 236 ..... 19
Skelly Oil Co. v. Phillips Co. (1950) 339 U.S. 667 ..... 2
Standard Oil Co. of California v. Aglsaud (N.D. Cal. 1977) 442 F.Supp. 695, affirmed (9th Cir. 1980) 633 F.2d 760, affirmed (1981) 454 U.S. 801 ..... 12, 13
State of Washington v. American League of Prof. Base. Clubs (9th Cir. 1972) 460 F.2d 654 ..... 3, 4
Swafford v. Templeton (1902) 185 U.S. 487 ..... 2
Tennessee v. Union and Planters' Bank (1894) 152 U.S. 454 ..... 2
The Fair v. Kohler Die Co. (1913) 228 U.S. 22 ..... 2

Page

Miscellaneous

128 Cong. Rec. §13151 (daily ed., Oct. 1, 1982) ..... 13

H. Rep. No. 93-533, 93d Cong., 2d Sess. (1974) U.S. Code Cong. & Admin. News, pp. 4639, 4640-4641 ..... 10

S. Rep. No. 187, 86th Cong., 1st Sess. reprinted in U.S. Code Cong. & Admin. News, pp. 2318, 2344 ..... 14

S. Rep. No. 93-127, 93d Cong., 2d Sess. (1974), U.S. Code Cong. & Admin. News, pp. 4838, 4839-4840 ..... 10

Williams, Jr., Chairman of Senate Committee on Labor and Public Welfare, 93rd Cong., 2d Sess. (1974) U.S. Code Cong. & Admin. News, p. 5177 ..... 10

1974 U.S. Code Cong. & Admin. News, pp. 4645, 4847, 5075 et seq. ..... 15, 18

Regulation

Code of Federal Regulations, Title 26, Sec. 1.401(a)-13(b)(2) ..... 19

Statutes

California Revenue and Taxation Code, Secs. 18817-18819 ..... 13, 14

California Revenue and Taxation Code, Sec. 18817 ..... 8, 9, 11, 19, 20

California Revenue and Taxation Code, Sec. 18931 ..... 13

Employment Retirement Income Security Act of 1974 (ERISA) Sec. 206(d) ..... 11

Employment Retirement Income Security Act of 1974, Sec. 403(c)(1) (29 U.S.C. § 1103(c)(1)) ..... 15, 16, 18

Employment Retirement Income Security Act of 1974, Sec. 404(a)(1) (29 U.S.C. § 1104(a)(1)) ..... 15, 16, 18

Employment Retirement Income Security Act of 1974, Sec. 514 ..... 6, 8, 12

Employment Retirement Income Security Act of 1974, Sec. 514(a) (29 U.S.C. § 1144(a)) ..... 8, 11, 12, 15, 16

Page

Employment Retirement Income Security Act of 1974, Sec. 514(c)(2) ..... 8
United States Code, Title 28, Sec. 1331 ..... 5
United States Code, Title 28, Sec. 1341 ..... 4

Textbooks and Treatises

Bogert, Trusts and Trustees Revised (2d ed., 1979) Sec. 224, p. 464 ..... 17
Cox, "Labor Law Preemption Revisited," 85 Harv. L. Rev., pp. 1337, 1365 (1972) ..... 19
Hart & Wechsler, The Federal Courts & The Federal System (2nd Ed., 1973) ..... 6
Restatement of Trusts, Second, Sec. 157, p. 328 ..... 17
Restatement of Trusts, Second, Sec. 157(d) (1948 Supp.) . 17
2 Scott, Trusts (3d ed. 1967) p. 1222 ..... 17
14 Wright & Miller, Federal Practice and Procedure, Sec. 3722 (1982) Supp. p. 209 ..... 6

No. 82-695

IN THE

# Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

*Appellant,*

*vs.*

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

*Appellees.*

## REPLY BRIEF.

## ARGUMENT.

### I.

### THIS CASE DID NOT ARISE UNDER FEDERAL LAW; THEREFORE THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

The Franchise Tax Board of the State of California (the Board) originally filed this action, which was authorized solely by California law in the Superior Court of the State of California for the County of Los Angeles. Construction Laborers Vacation Trust and its Trustees (CLVT) filed a Petition for Removal of the action to District Court. The action was removed.

Generally an action may only be removed from state court to federal court if the federal court would have had original jurisdiction over the matter had it been brought there initially. (*Arkansas v. Kansas & Texas Coal Co.* (1901) 183 U.S. 185, 189; *First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank* (8th Cir. 1980) 627 F.2d 843, 848. Removal of the present case was proper then, only if the Board's causes of action arose under Federal law and the Board could have originally brought this suit in District Court.

There is no authority under the Employment Retirement Income Security Act of 1974 (ERISA) for the Board to bring an action in federal court. Moreover, the Board relied solely on state law.

Certain guidelines have been established by this Court for almost 100 years which determine whether a case "arises under" federal law. In order for CLVT to prevail in this case, these principles would necessarily have to be abrogated. These principles are as follows:

1. The right created by federal law must be an essential element of plaintiff's cause of action and this federal claim must appear on the face of the "well-pleaded complaint" unaided by the answer or petition for removal. *Phillips Petroleum Co. v. Texaco, Inc.* (1974) 415 U.S. 125, 127-28; *Pan Am. Corp. v. Superior Court* (1961) 366 U.S. 656, 663; *Skelly Oil Co. v. Phillips Co.* (1950) 339 U.S. 667, 672; *Gully v. First Nat. Bank* (1936) 299 U.S. 109, 112-113; *The Fair v. Kohler Die Co.* (1913) 228 U.S. 22, 25; *Louisville & Nashville R.R. v. Mottley* (1908) 211 U.S. 149, 152; *Tennessee v. Union and Planters' Bank* (1894) 152 U.S. 454, 461-62.

2. The plaintiff must be contending that a federally created rule or law creates his cause of action. *Bell v. Hood* (1946) 327 U.S. 678; *The Fair v. Kohler Die Co., supra*, 228 U.S. at 24-25; *Swafford v. Templeton* (1902) 185 U.S. 487, 494.

3. The complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement of plaintiff's cause of action and anticipates or replies to a probable defense. *Phillips Petroleum Co. v. Texaco, Inc., supra*, 415 U.S. at 128. *Gully v. First Nat. Bank, supra*, 299 U.S. at 113; *Skelly Oil Co., supra*, 339 U.S. at 672; *The Fair v. Kohler Die Co., supra*, 228 U.S. at 25; *Louisville & Nashville R.R. v. Mottley, supra*, 211 U.S. at 152; *Arkansas v. Kansas & Texas Coal Co.* (1901) 183 U.S. 185, 189; *Tennessee v. Union and Planters' Bank, supra*, 152 U.S. at 464.

4. The party who brings a suit is master to decide what law he will rely on. *Pan Am Corp. v. Superior Court, supra*, 366 U.S. 656 at 662; *The Fair v. Kohler Die Co., supra*, 228 U.S.

at 25, and the plaintiff determines whether he brings a suit "arising under" the laws of the U.S. (*Id.*)

5. "If the plaintiff decides not to invoke a federal right, his claim belongs in a state court." (*Pan Am. Corp. v. Superior Court, supra*, 366 U.S. at 663.)

The Board's causes of action are based solely on State law. It is not necessary to construe a federal statute in order for the Board to recover under its Notice To Withhold. Construction of a federal statute is only relevant to CLVT's defense. Where a plaintiff has predicated his suit upon rights created by state law, the fact that federal regulations or law may create a defense and these federal regulations or law may have to be interpreted in connection with that defense, does not create federal jurisdiction. (*Madsen v. Prudential Federal Sav. & Loan Ass'n.* (10th Cir. 1981) 635 F.2d 797, 801, cert. denied (1981) 451 U.S. 1018.)

In spite of the holdings of this Court that a federal defense does not create subject matter jurisdiction, CLVT argues that the specific defense of preemption can create jurisdiction. (Brief, pp. 16-17.) However, it is clear that federal preemption is merely a defense to state law claims and thus forms no independent basis for jurisdiction. *Michigan Sav. & Loan League v. Francis* (6th Cir. 1982) 683 F.2d 957, 960; *People of State of Ill. v. Kerr-McGee Chem. Corp.* (7th Cir. 1982) 677 F.2d 571, 577, cert. denied (1982) 103 S.Ct. 469; *First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank* (8th Cir. 1980) 627 F.2d 843, 853; *Home Federal S & L Ass'n. v. Ins. Dept. of Iowa* (8th Cir. 1978) 571 F.2d 423, 426; *Alton Box Bd. Co. v. Esprit De Corp.* (9th Cir. 1982) 682 F.2d 1267, 1270; *Miller-Wohl Co. v. Com'r of Labor & Industry* (9th Cir. 1982) 685 F.2d 1088, 1090; *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n* (9th Cir. 1981) 656 F.2d 1364, 1367, cert. denied (1982) 455 U.S. 1020.[1] *State of Wash-*

[1]CLVT discusses selective portions of the *Guinasso* opinion which it mistakenly believes supports its arguments. A full reading of the *Guinasso* opinion, however, indicates that it is totally supportive of the Board's position. For example, the *Guinasso* court states:

> "A substantial proposition of federal law must form a 'direct and essential ingredient of the plaintiff's cause of action.' (Citation)" *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n., supra*, 656 F.2d at 1366.

The Court further states "But when the claim presents a prima facie basis for relief entirely under state law, the preemption defense does not support federal jurisdiction." (*Id.* at 1367.)

*ington v. American League of Prof. Base. Clubs* (9th Cir. 1972) 460 F.2d 654, 660; *Madsen v. Prudential Federal Sav. & Loan Ass'n.* (10th Cir. 1981) 635 F.2d 797, 801. (*See Gully v. First Nat. Bank, supra*, 299 U.S. at 112-18; *Pan Am. Corp. v. Superior Court, supra*, 366 U.S. at 662-65.

This principle is consistent with the general principles of federal question jurisdiction and it follows the holding of this Court in *Gully v. First Nat. Bank, supra*, 299 U.S. 109.

In fact, the 8th Circuit in *First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank* (8th Cir. 1980) 627 F.2d 843 stated that this issue has already been decided in the *Gully* case. Quoting the following passage from *Gully*: "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby," the 8th Circuit concludes as follows: "These quoted passages clearly suggest that the Gully court believed a defensive assertion of preemption did not give rise to federal question jursidiction." (*Id.* at 852.)

The Board has thus demonstrated that this action, based on state law, filed by the Board in state court, should not have been removed to District Court. Since CLVT cannot establish subject matter jurisdiction on the basis of what actually happened, CLVT begins its discussion of jurisdiction by arguing that this case should be decided on the basis of what *might* have happened. (Brief, p. 8.) CLVT obviously wishes that it had been the plaintiff rather than the defendant in this case.

However, no matter how much CLVT wishes it could have brought this action in District Court, the fact is that the Board brought this action in state court and relied only on State law as a basis for its recovery.

In addition, it is clear that any action CLVT would have tried to bring in District Court would have been barred by 28 U.S.C. 1341 which provides that "[T]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may

be had in the courts of such state." CLVT had an adequate remedy at State law because it could have asserted its argument of preemption in the State court action which the Board had already filed. *Kohn v. Central Distributing Co.* (1939) 306 U.S. 531, 533. See Hart & Wechsler, The Federal Courts & The Federal System, Second Edition (1973) p. 978. Finally, even if CLVT had been the plaintiff and brought a case for declaratory relief in District Court premised on alleged presumption, there is ample authority in the cases previously discussed that the case would not have arisen under federal law.

This Court's holding is *Public Serv. Comm'n v. Wycoff, Co.* (1952) 344 U.S. 237 is also instructive in this regard. In *Wycoff*, this Court stated as follows:

> "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. . . . Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Id.* at 248

By its declaratory relief action, CLVT would be seeking a declaration that it had a good defense to the action of the Franchise Tax Board. However, it is the character of the threatened action and not the defense that determines whether there is federal question jurisdiction. Since the Board's threatened or real action arose only under State law, this would not create federal question jurisdiction.

CLVT next argues that even though the Board was the plaintiff rather than the defendant, and that CLVT filed a Motion To Dismiss rather than an answer or counterclaim, we should pretend that CLVT filed an answer or a counterclaim although the facts show this did not actually happen. (Brief, p. 10.)

Even if CLVT had filed a counterclaim, it is clear that removability cannot be created by defendant pleading a counterclaim presenting a federal question under 28 U.S.C. § 1331. *Rath Packing Co. v. Becker* (9th Cir. 1975) 530 F.2d 1295, 1303, *aff'd on other grounds sub nom. Jones v. Rath Packing Co.*

(1977) 430 U.S. 519; 14 Wright & Miller, Federal Practice and Procedure, § 3722 (1982) Supp. p. 209.

State courts are competent to decide any questions of federal law which arise in this case. As this court stated in *Arkansas v. Kansas & Texas Coal Co.* (1901) 183 U.S. 185, 190-91, "When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them." In *Pan Am. Corp. v. Superior Court, supra*, 366 U.S. 656, this court stated:

> "Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions." (*Id.* at 665.)

It is clear that there is no right created by federal law which is an essential element of the Board's causes of action. Application of the above stated principles to the case at bar compels the conclusion that this case should not have been removed to the District Court as it did not "arise under" federal law.

## II.

## CALIFORNIA REVENUE & TAXATION CODE SECTION 18817 HAS NOT BEEN PREEMPTED BY ERISA SECTION 514.

CLVT contends that California's tax levy statute is preempted by ERISA section 514 insofar as the State statute is used to levy on a vacation fund to collect the delinquent taxes of a participant or beneficiary of that fund.

At the outset, it should be emphasized that the statute which is the target of possible preemption is a State tax collection statute. Furthermore, this case concerns the Board's levy on a *vacation* fund only. The Board has not attempted to levy on a *pension* fund. In addition, the Board has not assessed a tax *on* the vacation fund itself. Rather, the fund is merely a tax collection source.[2]

---

[2]This fact distinguishes this case from *National Carriers' Conf. Com. v. Heffernan* (D.Conn. 1978) 454 Fed. Supp. 914 where the State attempted to specifically tax the benefits paid by a welfare plan. Moreover, the court noted that the preempted statute was "not merely a general taxing provision that catches employee benefit plans within its wide sweep. On the contrary, the tax [was] specifically directed at such plans exclusively, . . ." (*Id.* at 915.)

It is apparent that Congress did not intend for taxpayers covered under ERISA plans to finance their annual vacation before they pay their taxes. Furthermore, if CLVT and the delinquent taxpayers are now able to shield vacation pay from a legitimate tax levy under the authority of ERISA, this could create serious possibilities of tax avoidance in the future. For example, if CLVT prevails in this case, what is to prevent the next trust agreement from providing that half of a worker's salary shall be deposited in an ERISA vacation trust and that the salary will not be subject to State income tax of any kind? Surely, Congress did not intend such a result, yet that is the logical extension of a holding that an ERISA plan can shield certain funds from levy.

It is a serious step to preempt a state statute, especially a statute dealing with the collection of taxes, one of the traditional police powers of the State. As this Court has stated, the "exercise of federal supremacy is not lightly to be presumed." (*Alessi v. Rabestos-Manhattan, Inc.* (1981) 451 U.S. 504, 522, quoting *New York State Dept. of Soc. Services v. Dublino* (1973) 413 U.S. 405, 413. In addition, since this is a field which has traditionally been occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230; Accord *Jones v. Rath Packing Co.*, (1977) 430 U.S. 519, 525.)

It is clear that the State of California has a vital public interest in collecting its revenue. Thus, a tax collection statute must be accorded a high presumption of validity. As this Court stated in *Kelly v. Washington* (1937) 302 U.S. 1, 14, "When the State is seeking to protect a vital interest, we have always been slow to find that the enaction of Congress has shorn the State of the power which it would otherwise possess."

It is equally true that "The exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " (Citations) *Id.* at 10.

In the case of *Hines v. Davidowitz* (1940) 313 U.S. 52, this Court stated:

> "Any concurrent state power [over alien registration] that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax." (312 U.S. at 68.)

In determining whether Congress has clearly manifested that Revenue and Taxation Code section 18817 must be preempted, it is necessary to examine ERISA in general and specifically section 514.

### A. Revenue and Taxation Code Section 18817 Does Not Relate to nor Regulate the Terms and Conditions of a Vacation Plan.

An examination of possible preemption under ERISA section 514 must begin with an analysis of section 514 itself.

The Franchise Tax Board contends that ERISA's preemption section is not limitless especially when it infringes on the sovereign power of the State of California to assess and collect delinquent taxes. It is only necessary to review this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504 to see that section 514 does not preempt *all* State laws with the most tangential relationship to ERISA. Otherwise, this Court would not have reserved for future cases the question of the "outer bounds" of ERISA's preemptive language. *Id.* at 525.

ERISA section 514(a) provides that "State" laws which "relate" to any employee benefit plan are superseded. ERISA section 514(c)(2) defines the term "State" to include a State "which purports to *regulate*, directly or indirectly, the *terms* and *conditions* of employee benefit plans covered by Title 1." (Emphasis added.)

Thus not *all* State laws are preempted, but only those laws that "relate" to ERISA. Preemption is further narrowed by the words of the statute which define a "State" as a State which "regulates" the "terms and conditions" of a covered plan. It must be assumed that the language of the statute regarding the "regulation" of the "terms and conditions" of the plan is not surplusage and that Congress chose it intentionally.

States are not prevented by this language from tangentially affecting all ERISA plans. Invalidation of all state legislation incidentally affecting ERISA plans would be far broader than the words Congress chose would support. For example, a building owned by an ERISA plan is surely subject to state laws regarding property taxes, fire and safety laws and similar matters historically regulated by the states, even though the state laws, when applied to a building owned by an ERISA plan, clearly tangentially affect the ERISA plan.

It is apparent that Revenue and Taxation Code section 18817 does not directly or indirectly regulate the terms or conditions of CLVT's vacation plan. The Plan continues to exist in its original form and Revenue and Taxation Code section 18817 merely allows the State to levy on funds that will eventually be paid to an individual participant. Furthermore, the State statute does not interfere with the purposes of ERISA, as will be discussed *infra*.

Contrary to the assertion by the Department of Labor (DOL), California's tax levy statute is not analogous to the state laws preempted in *Alessi, supra*, 451 U.S. 504 and *Kramarsky v. Delta Airlines, Inc.* (2nd Cir. 1981) 666 F.2d 21, appeal pending, No. 81-1578 (argued January 10, 1983). In *Alessi*, the State statute explicitly referred to pensions and disallowed an offset of worker's compensation payments against the pension payment. Thus, the State statute determined how the benefit would be calculated. In *Kramarsky*, the State statute required that employee benefit plans provide coverage for disability due to pregnancy on the same basis as other disabling conditions and that employers provide at least eight weeks of coverage for pregnancy-related disability. Thus, the statute mandated the terms and conditions of the plan.

The Board's levy statute, by contrast, does not focus specifically on pension or welfare plans. Furthermore, it does not mandate the terms or conditions of any plan and it does not interfere with the purposes of ERISA.

**B. Revenue and Taxation Code Section 18817 Does Not Interfere With the Purposes of ERISA.**

Congress did not intend to preempt all State laws with even an incidental connection to ERISA. It is more reasonable to assume that Congress only meant to preempt laws which interfered

with the purposes and coverage of ERISA. To require a vacation plan to honor a tax levy of the State of California does not interfere with the purposes of ERISA. Furthermore, there is nothing in ERISA's legislative history which indicates a "clear and manifest purpose" (*Jones v. Rath Packing Co., supra*, 430 U.S. 519, 528; to prohibit California from collecting a participant's delinquent taxes from a vacation fund.

ERISA is a comprehensive statute "which Congress adopted after careful study of private retirement pension plans." (*Alessi v. Raybestos-Manhattan, Inc.* (1980) 451 U.S. 504, 510). Congress wanted to ensure through ERISA that a worker actually received the retirement benefits he had earned. (*Alessi, supra*, 451 U.S. at 510).

ERISA was enacted in response to various findings by Congress that private pension plans were not properly funded, were mismanaged and promised benefits which were never paid. (House Rep. No. 93-533, 93rd Cong., 2d Sess. (1974) U.S. Code Cong. & Admin. News, p. 4639 *et seq.*) One three year congressional study of private pensions "clearly established that too many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized." Statement by the Honorable Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, 93rd Cong., 2d Sess (1974) U.S. Code Cong. & Admin. News, at p. 5177.

The basic purpose of ERISA is to protect the literally millions of people who depend on benefits from private pension plans for financial independence after retirement. (H. Rep. No. 93-533, 93d Cong., 2d Sess. (1974) U.S. Code Cong. & Admin. News, p. 4639, 4640-4641; S. Rep. No. 93-127, 93d Cong. 2d Sess., (1974) U.S. Code Cong. & Admin. News, pp. 4838, 4839-4840.)

ERISA made major reforms in the area of pension regulation. To a lesser degree, it provided protection for welfare plans.

A review of ERISA indicates that with regard to pension plans, Congress provided that workers would have reasonable participation and vesting rights, the plans would be adequately funded, that trustees would be held to high fiduciary standards, and that workers would have remedies if these provisions were not carried

out. Workers in welfare plans were given protection in the area of fiduciary responsibility, reporting and disclosure and they were given remedies to enforce these provisions.

There is nothing in ERISA to suggest that Congress meant to insulate vacation plans from Revenue and Taxation Code section 18817, a tax levy statute of general application. In this connection, it is important to note that with regard to pension plans, Congress specifically prohibited the alienation of funds. (ERISA § 206(d).) There is *no* provision of ERISA which prohibits the alienation of welfare benefits. Since Congress specifically protected pension plans from alienation but did not extend the same protection to welfare plans, this is further evidence that Congress did not intend to shield welfare plans from alienation, especially by a taxing agency.

Revenue and Taxation Code § 18817 is a statute of general application which does not mention or regulate vacation plans. It is purely a tax collection statute which serves the important public purpose of collecting revenue to fund the essential operations of the State of California. With regard to welfare plans, the purposes of ERISA are to assure that participants receive pertinent information about the plans and that the fiduciaries are held to a high level of responsibility. Revenue and Taxation Code section 18817 has no direct or indirect effect on these purposes of ERISA. It is clear that Congress can achieve its objectives with regard to welfare plans without controlling the collection of revenue by the State of California.

### C. Exceptions to ERISA's Preemption Have Been Found for High Public Purposes. The Collection of Revenue Serves a High Public Purpose.

The admission by CLVT that there is an exception in ERISA section 514(a) which allows ex-spouses and children to levy on welfare funds *and* the more highly regulated pension funds is fatal to its assertion that section 514(a) preempts *all* state laws. Obviously, as most courts have found, Congress did not intend to preempt State domestic relations laws and thus section 514(a) cannot be as broad as CLVT contends.

It is not a sufficient response for CLVT to argue that ERISA does not preempt domestic relations laws because ERISA was formulated to protect families of workers. If section 514(a) were as broad as CLVT argues, there could be no exception.

## III.

## THE POWER TO ASSESS AND COLLECT THE TAX IS ESSENTIAL TO THE STATE OF CALIFORNIA.

CLVT argues that the State of California would suffer no significant loss of revenue if it were not allowed to levy on the vacation fund. (Brief, p. 36.) This is not accurate since there are over 400,000 workers in California covered by vacation plans. More importantly, it is absurd to suggest that CLVT, or anyone else, may or may not interfere with the power of a State to collect its revenue depending on the amount at issue in one case.

## IV.

## THE AMENDMENT TO ERISA SECTION 514 MUST BE INTERPRETED BY REFERENCE TO THE AGSALUD DECISION.

As CLVT and others point out, section 514 of ERISA has recently been amended in direct response to this Court's affirmance of the Ninth Circuit's decision in *Standard Oil Co. of California v. Agsalud* (N.D. Cal. 1977) 442 F.Supp. 695, affirmed (9th Cir. 1980) 633 F.2d 760, affirmed (1981) 454 U.S. 801.

In the *Agsalud* case, the State of Hawaii attempted to require employers to provide their employees with a prepaid health care plan and to pay one-half of the premiums. Hawaii made several arguments as to why its law was not preempted by ERISA. One of these arguments was that the statute was an exercise of Hawaii's power to tax because it required the employers to pay half the insurance premiums of their employees. The Ninth Circuit did not agree with any of Hawaii's arguments and found the statute to be preempted.

As a result of this decision, ERISA section 514 was amended to exempt Hawaii's health benefit statute from preemption under section 514(a).

CLVT points to this amendment as evidencing Congress' intent to specifically preempt State tax laws. This interpretation, however, ignores the context in which the amendment arose. As the

reported decision indicates, Hawaii was arguing that the statute was an exercise of its *taxing* power since it was requiring a contribution from these employers. 442 F.Supp. at 710.

CLVT has cited no legislative history that Congress was concerned with the general tax collection laws of the States. The legislative history does indicate that the amendment was enacted to respond to the *Agsalud* decision. The amendment must be interpreted within the context of that case and the issues raised therein. Thus, it is logical to find that the amendment was designed to prohibit Hawaii or any other State from imposing a tax on employers to pay insurance premiums or benefits and to prohibit the States from taxing the ERISA fund itself. This interpretation corresponds to the context of the *Agsalud* case and the explanation of Senator Robert Dole, Chairman of the Finance Committee, who stated as follows:

> "The bill amends ERISA to provide that Hawaii law relating to employer maintained health insurance plans would not be preempted by ERISA to the extent that the Hawaiian law does not relate to matters thoroughly regulated under ERISA or impose tax liability on insurance premiums or benefits." [128 Cong. Rec. § 13151 (daily ed., October 1, 1982).]

Given the context of the *Agsalud* case and the remarks of Senator Dole, it is clear that Congress did not intend to preempt State tax collection laws which do not tax employers or ERISA benefits.

## V.

## THE BOARD MUST BE ALLOWED TO USE ITS CUMULATIVE TAX COLLECTION REMEDIES WITH REGARD TO THE CONSTRUCTION LABORERS. THE WAGE GARNISHMENT REMEDY ALONE IS NOT ADEQUATE.

CLVT argues that since the Board could levy on the wages of the construction laborers, it should be precluded from levying on the vacation fund. (Brief, p. 29.)

It is true that the Board has several alternative methods by which it may effect collection. However, the methods are *cumulative* and may be used in combination with or separate from each other. (Rev. and Tax. Code § 18931.) As in the instant case, a Notice To Withhold may be issued. (Rev. and Tax. Code

§§ 18817-18819.) There is no authority which holds that a taxing agency must use one remedy to the exclusion of another.

In addition, with regard to delinquent taxpayers in the construction industry, the wage garnishment procedure is most often ineffective as a collection mechanism. The reason for this is the same as the reason vacation funds are established; that is, individuals in the construction industry frequently work for several employers for short periods during a year. Furthermore, these individuals are often between jobs and thus receiving no wages.[3] By the time the Board discovers that a company has employed the tax debtor, through employer returns which have been filed with the State, the tax debtor often has completed the job with the company and moved on to other employment. Consequently, the Board is usually one step, or more, behind the tax debtor. However, wage garnishments returned by previous employers often indicate the tax debtor's occupation and/or union affiliation. This information is used to determine if an Order To Withhold should be issued to a vacation plan.

If the Board determines that an Order To Withhold should be issued to a vacation plan, the Board attempts to accommodate the administrators of the plan by issuing the Orders To Withhold only during periods reasonably close to the dates the contributions become payable.

Thus, the vacation fund as well as the wages of the workers should be available to satisfy tax liabilities.

---

[3]This seasonal, transitory nature of the construction industry has been discussed by Congress, the courts and the Department of Labor.

In the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, it states that:

> "The occasional nature of the employment relationship makes this industry [the building and construction industry] markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction."

S. Rep. No. 187, 86th Cong., 1st Sess. (1959), in U.S. Code Cong. & Admin. News, pp. 2318, 2344.

## VI.
## THE DEPARTMENT OF LABOR RULING IS INCORRECT.

CLVT relies on the December 28, 1979 opinion of the United States Department of Labor ("DOL") that the vacation trust is exempt from the Board's levy.[4]

The Board contends that the DOL opinion is of no assistance in deciding the issues before this Court. The DOL opinion cites one section of the subject vacation trust agreement (the non-alienation section), two sections of ERISA dealing with the assets and fiduciaries of ERISA plans, and the so-called preemption section. The DOL opinion letter then concludes, without any analysis, that the Board is preempted from levying on the vacation trust.

The DOL opinion first relies on section 9.08 of the trust instrument which is the non-alienation section. Section 9.08 is an attempt to create a spendthrift trust and, as the Board will discuss, *infra*, a taxpayer cannot create his own spendthrift trust and exempt it from the levy of a taxing agency.

The Department of Labor then refers to ERISA Sections 403(c)(1), 29 U.S.C. § 1103(c)(1) and 404(a)(1), 29 U.S.C. § 1104(a)(1), but does not discuss their application to the issue at hand.

The Board contends that these sections of ERISA was meant to protect beneficiaries from fiduciaries who might mismanage their trust funds. (*See*, e.g., 1974 U.S. Code Cong. & Admin. News, pp. 4645, 4847, 5075 et seq.) The sections were not intended to insulate taxpayers from their creditors, especially a taxing agency which is not an ordinary creditor.

The Department of Labor opinion then cites ERISA section 514(a), 29 U.S.C. § 1144(a) which it states established a broad preemption of all state laws insofar as they may relate to any

---

[4]The District Court did not follow the advisory opinion of the DOL and did find that it "exceeds the scope of ERISA, is not reasonably necessary to effectuate the purpose of ERISA and is inconsistent with the congressional policy underlying ERISA". The District Court, however, did not find that the advisory opinion is clearly erroneous, unreasonable, arbitrary and capricious and the language to the contrary in the Jurisdictional Statement is the result of an error in the printing.

employee benefit plan covered by Title I of ERISA. Then without analysis and without any discussion regarding the difference between a welfare plan and a pension plan, the DOL concludes that the state may not levy on benefits of the Plan (the vacation trust). The DOL opinion never states *why* the state may not levy.

It must be noted that the Department of Labor admits that the Internal Revenue Service may levy on employee benefit plans (Brief, p. 26) (presumably pension plans as well as welfare plans). The Department of Labor also admits that ex-spouses and children of beneficiaries of benefit plans have been allowed to levy on the plans (again presumably pension plans as well as welfare plans). This admission is contrary to the Department of Labor's reliance on ERISA sections 403(c)(1), 404(a)(1) and 514(a) to deny the Board's right to levy. In other words, if these ERISA sections do not preclude ex-spouses and children from levying on pension and vacation plans, then they cannot preclude the Board's levy on a vacation plan.

## VII.

## THE BOARD MAY LEVY UPON A SPENDTHRIFT TRUST IN ORDER TO SATISFY A PARTICIPANT'S TAX DELINQUENCY.

The Board has shown that ERISA by its terms does not preclude the Board from levying on vacation trust funds. CLVT argues, however, that the Trust at issue in this lawsuit is a "spendthrift" trust and thus should be protected from the Board's levy. (Brief 28-29.)

Spendthrift trusts are recognized in California in furtherance of the doctrine that an owner of property should have the right to give his property to another upon any condition he sees fit to impose. (*McGolgan v. Magee, Inc.* (1916) 172 Cal. 182, 186; However, it is against public policy to permit an individual to place his own property beyond the reach of his own creditors by use of this device. Thus, in the *McGolgan* decision, the California Supreme Court said:

> Whatever may be the consideration moving from others, the trust cannot be allowed to free the property from the claims of creditors, where the consideration for the conveyance to the trustee or, as in this case, the entire trust

property constituting the source of the income, is contributed by the beneficiary himself . . . ." (*Id.* at 188-189.)

In the instant case, the participants of the vacation plans are contributing to the plans in the form of their deferred compensation which has been remitted to the vacation fund by the employer. Thus, the participants of vacation plans should not be allowed to place their own property beyond the reach of their creditor, the Board.

Further, the Board is recognized as among the particular classes of claimants who are permitted to reach a beneficiary's interests under a spendthrift trust. The recognized authorities in the field of trusts unanimously agree that a state may levy upon the beneficiary's interest in a spendthrift trust. (Bogert, Trusts and Trustees Revised (2d ed. 1979) § 224, p. 464; 2 Scott, Trusts (3d ed. 1967) p. 1222.)

This position has also been adopted by the Restatement of Trusts, Second, section 157, p. 328. This section provides in relevant part:

"§ 157. Particular Classes of Claimants.

"Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary.

". . . .

"(d) by the United States or a State to satisfy a claim against the beneficiary."

The comment contained in the Restatement in regard to subsection (d) notes that the United States or a State can reach a spendthrift trust for the beneficiary's obligations arising completely independently of the trust. This obligation could be for a tax due. *Id.* at 331.

Cases dealing with federal taxes unequivocally hold that a spendthrift trust is not insulated from liability for taxes. *Leuschner v. First Western Bank and Trust Company* (9th Cir. 1958) 261 F.2d 705, 707-708; *Mercantile Trust Co. v. Hofferbert* (Md. 1944) 58 F.Supp. 701, 706. That these decisions are directly analogous to state tax claimants in like situations is best demonstrated by the reliance of the court in *Leuschner* upon Restatement of Trusts, Second, section 157(d) which refers to both federal and state claims. The liability of the spendthrift trust is

based upon the character of the claim as a tax delinquency and not upon the particular identity of the governmental agency asserting it.

The case of *Electrical Workers v. IBEW-NECA Holiday Trust*, 583 S.W.2d 154 (Mo. 1979), discussed the issue of spendthrift trusts. The court found that the Trust itself was valid but that the spendthrift clause was invalid. The court found that the payments made pursuant to the Holiday Trust were wages and that the IBEW member (the debtor) could "not create a trust for his own benefit and include a provision restraining the rights of his creditors." (583 S.W.2d at 162.) The court concluded:

> "In this context, we find no jurisdiction for permitting a person to do indirectly that which we [sic] cannot do directly. If a spendthrift clause such as this were held enforceable, who is to say that all wages of employees could not be sheltered from the claims of creditors by similar agreements." (*Id.*)

## VIII.

## ERISA SECTIONS 403(c)(1) AND 404(a)(1) DO NOT PROHIBIT THE BOARD'S LEVY.

CLVT relies on sections 403(c)(1) and 404(a)(1) of ERISA for its argument that the vacation funds could not be disbursed to the Board.

Section 404(a)(1) is the "basic fiduciary section of ERISA." (*In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 128, app. dismissed (1980) 444 U.S. 1028.) Congress was concerned that fiduciaries of ERISA plans were held to a high standard of accountability. (1974 U.S. Code Cong. & Admin. News, pp. 4645, 4847, 5075 *et seq.*) "Adherence to fiduciary standards is essential to the proper administration of a pension plan." (*In re Marriage of Campa, supra*, 89 Cal.App.3d at 128, app. dismissed (1980) 444 U.S. 1028.)

Turning over accumulated vacation benefits to the Board pursuant to its levy, has no bearing on the honest administration of a vacation plan, (*See In re Marriage of Campa, supra*, 89 Cal.App.3d at 128, app. dismissed (1980) 444 U.S. 1028); thus these sections cannot preclude the Board's levy.

## IX.

## REVENUE AND TAXATION CODE SECTION 18817 IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Revenue and Taxation Code section 18817 is not preempted under the National Labor Relations Act. The collection of taxes is a matter touching deeply rooted local concerns (cf. *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 244) which will not conflict with the federal scheme (cf. *Farmer v. Carpenters* (1977) 430 U.S. 290, 302). Furthermore, the Board is not seeking to apply a "substantive or remedial law whose formulation or application would involve weighing the same competing interests of employers, employees, labor unions and the public among which Congress struck a balance in establishing a national legal framework for the conduct of organizational activity, collective bargaining and labor disputes." (Cox, "Labor Law Preemption Revisited," 85 Harv. L. Rev. 1337, 1365 (1972).)

## X.

## ANY ADMINISTRATIVE DUTIES CAUSED BY THE BOARD'S LEVY ARE OUTWEIGHED BY THE STATE'S RIGHT TO THESE FUNDS.

CLVT has argued that there would be an administrative burden if it is required to honor the Board's levy. (Brief, p. 29.)

The administrative burden argument would be equally applicable to federal tax levies. However, pension plans are specifically subject to federal tax levies. 26 C.F.R. § 1.401(a)-13(b)(2), and the Department of Labor has advised CLVT that vacation plans are also subject to federal tax levies. (J.A., 72.)

This argument was rejected by the Court in *American Tel. & Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118 which balanced the increased administrative costs against the heavy burden that would be imposed on the public treasury if dependent spouses and children could not enforce their support rights and had to rely on welfare assistance. (*Id.* at 125.) In the case at bar, it is equally apparent that the right of California to collect its revenue easily outweighs any administrative costs to CLVT.

**Conclusion.**

It is clear that the District Court did not have subject matter jurisdiction of this action. It is also apparent that Revenue and Taxation Code § 18817 does not interfere with the provisions or purposes of ERISA. For these reasons the Board respectfully contends that the Decision of the Ninth Circuit Court of Appeals below should be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California,
EDMOND B. MAMER,
PATTI S. KITCHING,
Deputy Attorneys General,
*Attorneys for Appellant,*
*Franchise Tax Board of the*
*State of California.*